

OCT 14 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No.

77-559

HAROLD LANE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

=====
**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SECOND CIRCUIT
OF THE UNITED STATES**
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The petitioner Harold Lane respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Second Circuit of the United States entered in this proceeding on or about September 23, 1977 which affirmed the judgment of conviction herein.

Opinion Below

No written opinion was rendered by the Court of Appeals for the Second Circuit of the United States. The decision of said Court of Appeals was rendered in open court in an oral statement from the bench pursuant to the Rules of that Circuit. The Circuit Court held after hearing argument that the admission into evidence of a prior crime not charged in the Indictment during the Government's case was not an abuse of discretion by the trial court and that the remarks of the Government attorney during summation did not justify a mistrial. The Court further held that the other points (dealing with a request for a severance, a request for submission to the trial jury of a lesser included offense and for a dismissal of the Indictment at the end of the Government's case and notwithstanding the verdict of guilty) raised on appeal did not warrant a reversal of the conviction and a direction of a new trial.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit of the United States was entered on or about September 23, 1977. This petition for a Writ of Certiorari is being filed within 30 days of September 23, 1977. The jurisdiction of this Court is being invoked under 28 U.S.C. 1254(1).

Issues Presented

1. Whether the right of the petitioner to due process under the Fifth Amendment to the United States Constitution was violated by the remarks of the Government Attorney during summation which remarks in effect placed

a burden upon the petitioner to produce certain evidence and assume a burden of such production.

2. Whether the right of the petitioner to due process under the Fifth Amendment to the United States Constitution was violated by the admission into evidence at the trial of statements by the petitioner to a detective concerning and evidence of a prior crime not charged in the Indictment *and* the denial by the trial court of a request for a hearing in the absence of the trial jury as to the admissibility of said statements.

3. Whether the trial erred in denying the application of the petitioner to submit to the trial jury the lesser included offense and misdemeanor of failure to file an income tax return under section 7203 of Title 26 of the United States Code under the 24th, 25th and 26th counts of the Indictment.

Constitutional and Statutory Provisions Involved

Amendment V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Evidence, Rule 403

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rules of Evidence, Rule 404(b)

Character evidence not admissible to prove conduct; exceptions; other crimes.

. . . (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

United States Code, Title 26, Section 7201

Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisonment not more than 5 years or both, together with the costs of prosecution.

United States Code, Title 26, Section 7203

Willful failure to file return, supply information or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to the other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Statement of the Case

The petitioner was found guilty by jury trial before a judge of the United States District Court for the Southern District of New York in February of 1977 involving one count of embezzlement; three counts of income tax evasion and twenty-two counts of unlawfully making false written statements all of principally in regard to monies collected from the sale of Food Stamps which monies belonged to the United States of America through the Department of Agriculture. The petitioner was sentenced on March 25, 1977 to a term of up to four years on each count and to pay a fine. After the affirmance by the Court of Appeals for the Second Circuit he surrendered on September 26, 1977. The argument took place on September 14, 1977 and the affirmance was entered on or about September 23, 1977.

The petitioner was the principal officer in a corporate entity known as Lane Check Cashing, Inc. Testimony was offered by the Government through a White Plains, New York, police detective and an employee of Lane Check Cashing, Inc. that on March 21, 1974 there was an armed robbery at a Lane Check Cashing, Inc. establishment in that city. A robber purportedly entered the establishment at which time, according to a signed statement taken by the White Plains Police Department from the petitioner, the petitioner claimed that there was \$23,000.00 on hand. It was the contention of the Government that there was only \$3,000.00 on hand and that the claim of the petitioner with regard to the additional \$20,000.00 was false. The Government also introduced evidence to the effect that on a later date the petitioner made an insurance claim in the amount of approximately \$5,200.00. The White Plains, New York, detective further testified that he did not give any so-called *Miranda* warnings to the petitioner until after he obtained a written statement from the petitioner which contained the allegedly false assertions above referred to.

Counsel for the petitioner was advised by the Government that such proposed testimony would be introduced by the Government at the trial. In the absence of the trial jury the Government contended that the evidence proposed should be admitted in the case-in-chief on the ground that the false statements of the petitioner in relation to the March 1974 robbery of the White Plains check cashing establishment showed a pattern of false statements made routinely and regularly. Counsel for the petitioner objected to the admissibility of such testimony on the ground that its probative value, if any, was far outweighed by the prejudice that would result and on the further ground that the White Plains police detective should have advised the petitioner of his rights

under the *Miranda* decision and having failed to do so that such testimony by that detective should not be permitted. A further application was made at the trial for a hearing in the absence of the trial jury on the *Miranda* grounds to determine the admissibility of such testimony. This application was denied and the Trial Court permitted the testimony into evidence over the objection of trial counsel. The Trial Court did instruct the trial jury as to the purpose of the introduction of such testimony during the course of the trial itself and during the course of the general instructions to the jury.

An application was made to the Trial Court to instruct the trial jury as to the lesser included offense and misdemeanor of failure to file income taxes in violation of section 7203 of Title 26 of the United States Code. This request for such an instruction was denied by the Trial Court. During the course of the Summation remarks by the Government Attorney the following comment was made: "First of all, I would just want to say remember that what you are dealing with here is evidence in this case, evidence that you have heard from the witness stand and evidence and documents that are marked in evidence, not the imaginations of either myself or Mr. Herold with respect to what could have been said, what might have been said, what may be out there in documents some place that have not been brought into this courtroom by the defense case here." A motion for a mistrial on the basis of these comments by the Government Attorney was made by counsel for the petitioner and denied by the Trial Court.

REASONS FOR GRANTING THE WRIT

1. The decision below raised significant and recurring problems concerning the right of an accused at a trial to due process when the Government in its remarks seeks to reduce the level of proof necessary for a conviction.

The Government Attorney in her remarks by implying that there was something that could have been produced by the defense case acted in such a fashion as to reduce the level of proof necessary for the Government in the first place to carry its burden. The effect of such comments by the Government Attorney was to plant in the minds of the trial jury that there was a requirement of the petitioner to establish his innocence in some fashion.

The accused in any criminal case is presumed to be innocent and that Constitutionally rooted presumption of innocence must not be upset (*Cool v. United States*, 409 U.S. 100, 34 L. Ed. 2d 335, 93 S. Ct. 354). Additionally the Constitution requires proof of the guilt of an accused beyond a reasonable doubt (*In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068).

2. The admission into evidence of statements and evidence of another crime not charged in the Indictment violated the right of the petitioner to due process under the Fifth Amendment to the United States Constitution.

When the Government first introduced this evidence it stated that it would show that the petitioner had an opportunity to embezzle funds. This was really saying that there was a criminal propensity or disposition of

the petitioner to steal. This alone was prejudicial to the petitioner (*Bradley v. United States*, 1969, Court of Appeals for the District of Columbia Circuit, 433 F. 2d 1113) and should have prevented its introduction. Additionally the Government stated that the evidence would corroborate what other witnesses had already said. This appears to be just another example of impermissible bolstering of witnesses or inadmissible self-serving testimony which ought not to have been permitted also. It seems clear that the evidence was allowed upon the theory that it was relevant and that its probative value exceeded any prejudicial impact (*United States v. Papadakis*, 1975, Court of Appeals for the Second Circuit, 510 F. 2d 287, 294, Cert. Den. 421 U.S. 950, 95 S. Ct. 1682, 44 L. Ed. 2d 104). This is clearly a lesser degree of proof—or relevance if you will—as a prerequisite in the Second Circuit than in the Eighth or Fifth Circuits. In those circuits evidence of a crime other than one charged in the Indictment, in order to be admissible, must also be supported by independent evidence showing that the commission of the other crime is clearly and convincingly established (*United States v. Oliver*, 1975, Circuit Court of Appeals for the Eighth Circuit, 525 F. 2d 731, 739-740, Cert. Den. 424 U.S. 1973, 96 S. Ct. 1477, 47 L. Ed. 2d 743; *United States v. Calvert*, 1975, Circuit Court of Appeals for the Eighth Circuit, 523 F. 2d 895, 906; 424 U.S. 911, 96 S. Ct. 1106, 47 L. Ed. 2d 314 and *Bullard v. United States*, 1968, Circuit Court of Appeals for the Fifth Circuit, 395 F. 2d 658). It is submitted that this standard of proof was not met in the instant case at bar. Even if this evidence were to be considered relevant under the Federal Rules of Evidence (Rule 404(b)) it still should have been excluded in that it was a needless presentation of cumulative evidence, a waste of time, a cause of undue delay, and any probative value which it may have

had was substantially outweighed by the danger of misleading the jury, confusing the issues and unfair prejudice as against the petitioner (Federal Rules of Evidence, Rule 403).

3. The Trial Court erred in denying the application of the petitioner to submit to the Trial Jury the lesser included offense and misdemeanor of failure to file an income tax return under section 7203 of Title 26 of the United States Code under the last three counts of the Indictment.

Sections 7201 and 7203 of Title 26 of the United States Code both apply to income tax violations and the lesser included offense doctrine applies to these statutes in an appropriate case (*Spies v. United States*, 317 U.S. 492, 495, 87 L. Ed. 418, 421, 63 S. Ct. 364 and *Sansone v. United States*, 380 U.S. 343, 13 L. Ed. 2d 882, 85 S. Ct. 1004). There was no contest in the trial court as to the petitioner not filing income tax returns. Rather the issue was as to the reasons why the returns were not filed. The Government contended it was done through a willful intent to evade taxes whereas the petitioner through cross-examination of various witnesses testifying on behalf of the Government contended there was no element of intent to evade taxes. Therefore to the extent that disputed issues of fact could have justified the trial jury in finding the petitioner not guilty of the offense under section 7201 yet guilty of the offense under section 7203 there was error by the Trial Court in refusing the requested submission of the lesser included offense and misdemeanor of failure to file an income tax return (see dissenting opinion of former Associate Justices Black and Douglas in *Sansone v. United States*, supra).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and decision of the Court of Appeals for the Second Circuit of the United States.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX

Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cal. No. 167

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of September one thousand nine hundred and seventy-seven.

Present:

HON. WILLIAM H. MULLIGAN
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges

HON. ALBERT W. COFFRIN
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HAROLD LANE,

Defendant-Appellant.

77-1226

Appeal from the United States District Court for the Southern District of New York.

*Judgment of the United States Court of Appeals
for the Second Circuit*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By ARTHUR HELLER
Deputy Clerk